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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. HERBERT HORATIO SIMMONS, Defendant and Appellant.	B291873 (Los Angeles County Super. Ct. No. GA083856)

APPEAL from an order of the Superior Court of Los Angeles County, Stan Blumenfeld, Judge. Affirmed.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant Herbert Horatio Simmons appeals from an order denying his motion to reduce his felony convictions to misdemeanors pursuant to Penal Code section 17, subdivision (b).[1]

Defendant's counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), raising no issues on appeal and requesting that we independently review the record to determine if the lower court committed any error. Defendant subsequently filed a supplemental brief in which he raises issues concerning the sufficiency of the evidence supporting the court's order and the effectiveness of his trial counsel.

We affirm.

FACTUAL SUMMARY AND PROCEDURAL HISTORY

A. *Factual Background*

During a preliminary hearing, Helen P. testified that she and defendant, her former fiancé, were living together in May 2011. On May 3, 2011, defendant accused Helen P. of having an affair with another man. Over several hours, defendant kept Helen P. in their bedroom and beat her repeatedly. Specifically, defendant punched her with his closed fist on her face, head, arms, legs and "throughout [her] entire body." Helen P. initially held their 11-month old child in her arms as defendant hit her. Defendant took the child from Helen P. and held him in one hand as he continued to hit Helen P. with the other hand. The beating left Helen P. bruised on her arms, legs, and face and caused her to suffer headaches for days. Photographs showing the bruises on Helen P. were introduced at the preliminary hearing.

Helen P. further testified that on May 11, 2011, she and defendant had a conversation in which defendant threatened to

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[1] Unless otherwise specified, subsequent statutory references are to the Penal Code.

slit her throat and "rip [her] guts out." The threats caused Helen P. to fear that he would kill her and their two children. Helen P. surreptitiously recorded the audio of the conversation, which was admitted into evidence over defendant's objection.[2] In the recording, defendant tells Helen P., "I swear, bitch, I'm gonna fucking rip your guts out." And in response to Helen P.'s reference to sending "one quick email" to someone, defendant stated, "One quick email, dude, how 'bout one quick slit in your throat, how 'bout that? That'll work too. It's quick, how about that?"

Two days later, Helen P. reported the incidents to the police, who took photographs of Helen P.'s bruises.

B. *Trial Court Proceedings*

In May 2012, defendant was charged by information with corporal injury to a cohabitant (count 1; former § 273.5, subd. (b)),[3] making criminal threats (count 2; former § 422)[4] and felony child

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[2] Although secret recordings are generally illegal and inadmissible (§ 632, subds. (a) & (d)), an exception applies to recordings made "for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of . . . any felony involving violence against the person." (§ 633.5.) The trial court allowed the evidence of the recording on this ground.

[3] When defendant committed his crimes in May 2011, section 273.5, subdivision (a) provided: "Any person who willfully inflicts upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child, corporal injury resulting in a traumatic condition, is guilty of a felony." It is punishable as either a felony or a misdemeanor. (*Ibid.*)

[4] At the time defendant committed his crimes, section 422 made it a crime, punishable as either a felony or a misdemeanor, to "willfully threaten[] to commit a crime which will result in death or great bodily injury to another person, with the specific intent

abuse (count 4; former § 273a, subd. (a)). (The information did not include a count 3.) The court subsequently amended the information by reducing the child abuse count to misdemeanor child abuse. (Former § 273a, subd. (b).)

In June 2014, defendant pleaded no contest to each count. The court suspended the imposition of sentence and placed defendant on three years probation.[5]

Defendant completed probation without violating its terms and conditions. In October 2017, the court granted defendant's petition to allow him to withdraw his no contest pleas and to dismiss the information pursuant to section 1203.4.

On July 12, 2018, the court heard defendant's motion to reduce his felony convictions to misdemeanors pursuant to section 17, subdivision (b).[6] In support of the motion, defendant

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that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety." It is punishable as either a felony or a misdemeanor. (*Ibid.*)

[5] Although counts 1 and 2 could be punished as either felonies or misdemeanors (former § 237.5, subd. (a) & former § 422), the grant of probation without the imposition of sentence effectively made them felonies unless and until subsequently reduced to misdemeanors pursuant to section 17, subdivision (b). (*People v. Feyrer* (2010) 48 Cal.4th 426, 438–439.)

[6] As defendant recognizes, the dismissal of the information pursuant to section 1203.4 does not expunge or nullify the convictions. (*Skulason v. California Bureau of Real Estate* (2017) 14 Cal.App.5th 562, 568.) Among other enduring consequences,

submitted a declaration. It states: "I do not have a history of violence, domestic or otherwise. I admit that I have made mistakes in my past relationship with Helen [P.] and have accepted responsibility by my over 50 court appearances over the past several years, completion of 3 years of probation and [one] year of domestic violence classes in addition to [time in custody]. I have not violated any restraining order past or present and have paid in full all debts and fines to the court and probation. [¶] . . . It's been over 7 years . . . since the incident report was filed [in May 2011] and I hope this has been enough time to establish that I am not a threat to Helen [P.] or society at large."

At the hearing, defendant referred to a police incident report, which he said indicated that the injuries Helen P. suffered were "marked 'minor.' " He asked the court rhetorically: "[H]ow did minor injuries turn into felony conduct when it was reported by the officer as minor." Defendant admitted that he hit Helen P. "in the arm a couple times," but not with "substantial force." Regarding the criminal threats count, he stated he "was simply trying to get her to leave [him] alone."

The court stated that it would take the matter under submission and would look at the incident report submitted by defendant and review the file.[7]

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the conviction can be used to impeach the defendant in a subsequent proceeding and may be counted as a felony for purposes of anti-recidivism laws. (§ 1203.4, subd. (a)(1) & (2); see generally 3 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Punishment, § 719, pp. 1133–1134.)

[7] We granted defendant's motion to augment the record to include the police incident report. The copy of that report in our record is incomplete and appears to include only pages three through ten of the report. That portion does not include any reference to injuries being "minor." The portion available to us

On July 24, 2018, the court denied defendant's motion, stating: "The court has reviewed the file, including but not limited to the preliminary hearing transcript and the incident report that includes the portion submitted by the defendant at the hearing. According to the incident report, the victim described being assaulted on multiple occasions. She described, among other things, being 'repeatedly punched in the face, on her arms, and on her back' and then being kicked while on the floor. The police documented bruising on the victim's body, including 'bruising on her right upper bicep area,' bruising 'over an area covering her upper arm between her elbow and her shoulder,' 'five circular bruises that were approximately one inch in diameter on her upper right arm,' and 'bruising on her top left[]hand.' The victim also reported that the defendant had threatened to kill her, and that she recorded the threat (during which the defendant threatened to slit her throat). The victim reported that she was 'so afraid for her life that she was moving out of the house' that day. The victim also described the crimes in her testimony at the preliminary hearing."

The court stated that it considered and weighed the factors identified in *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978 (*Alvarez*): " '[T]he nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial' " along with other sentencing factors. The court applied these factors in this case and concluded "that a reduction under

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includes statements by Helen P. to a police officer that defendant "punched her in the face, on her arms, and on her back until she fell to the floor. Then he started to kick her with his foot." Helen P. further stated that "she felt extreme pain on her face, arms and back during the punching and kicking." The report also notes that the officers observed bruises on Helen P.'s right arm and left hand that appeared to be four to seven days old.

section 17[, subdivision](b) is not warranted, particularly in light of the callous and vicious nature of the crimes and vulnerability of the victims."

Defendant timely appealed.

C. *Post-Appeal Proceedings*

We appointed counsel to represent defendant. On November 30, 2018, defense counsel filed a brief pursuant to *Wende*, *supra*, 25 Cal.3d 436. On the same day, counsel sent to defendant copies of his brief, the clerk's transcript, and the reporter's transcript. Counsel also sent to defendant a copy of a letter he had previously mailed to defendant advising defendant of the nature of the *Wende* brief and informing defendant that he may file a supplemental opening brief within 30 days of the filing of the *Wende* brief.

On January 30, 2019, defendant filed a supplemental brief in which he requests that we independently review the record pursuant to *Wende*, *supra*, 25 Cal.3d 436. Defendant also asserts that the record proves that he did not hit Helen P. because of (1) the absence of medical records evidencing Helen P.'s injuries, and (2) Helen P.'s failure during the recorded audio conversation to mention that defendant hit her. He also suggests that his trial counsel was ineffective by failing to raise the facts that Helen P. "never saw a doctor [and] there was no medical proof of abuse."

In support of his supplemental brief, defendant filed a motion for judicial notice of: (1) the preliminary hearing transcript; (2) a transcript of the phone call between defendant and Helen P. that was introduced into evidence at the preliminary hearing; (3) a copy of a greeting card written by Helen P. to a third party; and (4) a copy of the court's July 24, 2018 minute order denying defendant's petition to reduce his felonies to misdemeanors.

DISCUSSION

A. *Request for Judicial Notice*

We grant defendant's motion for judicial notice as to the transcript of the telephone call because it was admitted into evidence at the preliminary hearing and is part of the record. (Cal. Rules of Court, rule 8.45(b)(1); Evid. Code, § 452, subd. (d).) We deny the motion as to the transcript of the preliminary hearing and the July 24, 2018 minute order because these items are already included in the reporter's transcript and the clerk's transcript, respectively. We deny the motion as to the copy of the greeting card because it is not within any category of a judicially noticeable matter specified in the Evidence Code. (See Evid. Code, §§ 451, 452.)

B. *Defendant's Contentions*

On appeal from a denial of a motion to reduce a felony to a misdemeanor under section 17, subdivision (b), the appellant has the burden " 'to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' " (*Alvarez*, *supra*, 14 Cal.4th at pp. 977-978; accord, *People v. Lee* (2017) 16 Cal.App.5th 861, 866.)

Here, the court recited and applied the appropriate factors in evaluating defendant's petition (see *Alvarez*, *supra*, 14 Cal.4th at p. 978), and Helen P.'s testimony at the preliminary hearing, her reports to the police, the police officers' observations of her bruises, the photographs of her bruises, and the threats defendant made in the recorded telephone call are sufficient to support the court's exercise of discretion in denying defendant's motion.

The absence of evidence that Helen P. sought or obtained medical treatment for her injuries and her failure to speak of the May 3 physical assault during the May 11 recorded conversation do not alter our conclusion. Medical treatment of injuries is not required to establish a corporal injury upon a cohabitant; "[s]ection 273.5 is violated even if the resulting injury is only bruising." (*People v. Manning* (2014) 226 Cal.App.4th 1133, 1142, fn. 4.) And Helen P.'s failure to mention the May 3 beating during the May 11 conversation does not negate the substantial evidence of the attack. For these reasons, defendant's trial counsel's failure to raise these points at the preliminary hearing does not constitute ineffective assistance of counsel. To the extent defendant is complaining that counsel should have raised this issue at some other point in the proceedings, our record is insufficient to support that claim. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267; *People v. Kelly* (2006) 40 Cal.4th 106, 126 (*Kelly*).)

C. *Conclusion*

Based on our review of the record and the applicable law, we are satisfied that defendant's counsel has fully complied with his responsibilities and that no arguable appellate issue exists. (*Wende, supra,* 25 Cal.3d at p. 441; *Kelly*, *supra*, 40 Cal.4th at p. 110.)

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur.

JOHNSON, J.

WEINGART, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.